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IN THE

Supreme Court of the United States

October Term, 196~~0~~1

No. ~~840~~ 72

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Florida

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IN THE

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October Term, 1960

No. ————

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Florida

Appellant appeals from the judgment of the Supreme Court of the State of Florida entered November 16, 1960, and respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (the Trial Court), issued a Memorandum Opinion and a Final Decree which are not reported. They are set forth hereinafter as Appendix "A" and "B", respectively.

The Opinion of the Supreme Court of the State of Florida is reported in 125 So.2d 554, the Official Reporter for the Supreme Court of the State of Florida. It is set forth hereinafter as Appendix "C".

JURISDICTION

These proceedings began with an action in the Circuit Court of Orange County, Florida, for declaratory relief against the Board of Public Instruction of Orange County, Florida (under provisions of Florida Statute 87.01) to determine the rights and status of the Appellant, a public school teacher, under the provisions of Florida Statutes 876.05 and 876.06, which require the execution of an expurgatory or loyalty oath as a condition precedent to continuing employment, and which said oath the Appellant failed to execute; and seeking a restraining order against dismissal.

The Circuit Court entered its Memorandum Opinion on March 16, 1960, holding that "F.S. 876.05 et seq. is constitutional and is mandatory as a condition precedent for public employment" and "the prayer for a permanent injunction in all respects should be denied."

Notice of Appeal to the Supreme Court of Florida was filed March 23, 1960. On November 16, 1960, the judgment of the Supreme Court of Florida was entered affirming the Circuit Court. Petition for Rehearing was denied without opinion.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by Title 28, United States Code, Section 1257(2). Cases sustaining the juris-

diction are **Atchison T. & S.F. Ry. Co. v. Public U. Commission** (1953), 346 U.S. 346, 74 S.Ct. 92; **Standard Oil Co. of California v. Johnson** (1942), 316 U.S. 481, 62 S.Ct. 1168; **Gerende v. Board of Supervisors**, 341 U.S. 56, 71 S.Ct. 565; and **Wieman v. Updegraff**, 344 U.S. 183, 73 S.Ct. 215.

STATUTES INVOLVED

The validity of the following statutes of the State of Florida is involved:

F.S. 876.05:

> "All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:
>
> > "'I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member

of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06:

"If any person required by §§ 876.05-876.10 to take the oath herein provided or fails to execute same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

QUESTION PRESENTED

Whether Florida Statutes 876.05 and 876.06, which require the Appellant, as a teacher and an employee of the Board of Public Instruction of Orange County, Florida, to

execute the oath therein contained are in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that there is denied to the Appellant due process of law, and equal protection of the laws; and are further in violation of the First and Fourteenth Amendments to the Constitution of the United States, upon the ground that there is denied to the Appellan freedom of speech, thought, and association; and are further in violation of Article I, Section 10, of the Constitution of the United States, upon the ground that they constitute a Bill of Attainder and an Ex Post Facto Law.

STATEMENT

The Appellant, DAVID WALTON CRAMP, JR., is a teacher in the public school system in Orange County, Florida, and is an employee of the Appellee, the BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA. He had been such for approximately nine (9) years next prior to the bringing of the action. DAVID WALTON CRAMP, JR. was requested by the Principal of the school where he taught to correct an oversight on the part of the BOARD OF PUBLIC INSTRUCTION in failing theretofore to require that he execute the oath required by Section 876.05, Florida Statutes.

Appellant refused to execute the oath on his expressed statement that the statutory requirement of the execution of such an oath as a condition precedent to his continuing employment as a public school teacher was in violation of his rights as guaranteed by the Constitutions of the State of Florida and of the United States.

Appellant then brought his action for declaratory relief in the Circuit Court of Orange County, Florida, alleging the invalidity of the statutes involved under the Constitutions of the State of Florida and the United States. He asserted that he was a loyal American and did not decline to execute or subscribe to the required oath for fear of any penalties imposed by law for a false oath, but on the contrary that he does and will support the Constitution of the United States and of the State of Florida; he is not a member of the Communist Party; that he has not, does not and will not lend aid, support, advice, counsel or influence to the Communist party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence.

Nevertheless, both the Circuit Court and the Supreme Court of Florida have upheld the validity of the statutes involved and their requirement of the execution of the oath therein contained as a condition of continuing employment. CRAMP's contract of employment was not renewed by the BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. THE FLORIDA STATUTE PRESCRIBES AN EXPURGATORY OR LOYALTY OATH AS A CONDITION PRECEDENT TO EMPLOYMENT OF PUBLIC SCHOOL

TEACHERS IN VIOLATION OF DUE PROCESS OF LAW.

Statutes imposing the requirement of a loyalty or expurgatory oath as a condition precedent to public employment, Government benefit or license, enacted shortly after the Civil War and relating to the political problems that beset that era, were stricken by the Supreme Court of the United States on the grounds that they were Ex Post Facto Laws and Bills of Attainder, **Cummings v. Missouri (1867 U.S.) 4 Wall. 277, 18 L. ed. 356, Ex parte Garland (1867 U.S.) 4 Wall. 333, 18 L. ed. 366.**

In recent years statutes imposing the requirement of loyalty oaths of similar type and relating to political problems of this age, again as conditions precedent to public employment and related occupations, have to some extent been upheld by the Supreme Court of the United States.

Thus in **Gerende v. Board of Supervisors,** 341 U.S. 56, 71 S.Ct. 565, the Maryland statute which denied a place on the ballot for municipal election in the City of Baltimore to one who did not subscribe to a required oath was declared to be valid.

Further in **Garner v. Board of Public Works,** 341 U.S. 716, 95 L. ed. 1317, 71 S.Ct. 909 (1951) the Court upheld the statute requiring the execution of loyalty oaths by those seeking public employment in the City of Los Angeles; and in **American Communications Association v. Douds,** 339 U.S. 382, 94 L. ed. 925, 70 S.Ct. 674 (1950) sustained the exaction of loyalty oaths from officers of labor unions.

In each instance the rationale was protection "from an evil shown to be grave (of) some interest clearly within the sphere of Government concern," (**Speiser v. Randall,** 357 U.S. 513, 2 L. ed. 2d 1460, 78 S.Ct. 1332) and it is clear that no blanket approval has been given to the exaction of loyalty oaths as a condition of public employment or benefit.

In **Speiser v. Randall,** (supra), and **First Unitarian Church v. Los Angeles,** 357 U.S. 545, 2 L. ed. 2d 1484, 78 S.Ct. 1350 the Court in striking down the oaths therein required has left open the question as to whether or not a loyalty oath can be made a condition of a tax exemption where the oath would **conclusively** establish the taxpayer's eligibility therefor.

The Supreme Court of the United States has never reached the question of whether or not a loyalty oath may be exacted from public school teachers. The required oath in **Wieman v. Updegraff,** 344 U.S. 183, 97 L. ed. 216, 73 S.Ct. 215, was stricken on the ground that it failed to include the element of **scienter;** and the Court did not reach the Constitutional question herein involved.

It is conceded that a teacher has been discharged for refusing to answer questions propounded by his superintendent during an investigation based on information reflecting adversely to the loyalty of the teacher and where the questions pertained to the fitness of the teacher in his field of endeavor, **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed 2d 1414, 78 S.Ct. 1317.

However, the requirement that a teacher respond in a question and answer investigation based on questions

relevant to competency and presumably begun because of information leading to a belief in his disloyalty is different and can be distinguished from the requirement of the execution of a loyalty oath. The refusal to sign a loyalty oath may be the equivalent of refusing to answer a question in the affirmative, "not the equivalent of refusing to answer. For example, if a public employee could be dismissed for refusing to sign an oath that he is not a Communist he would be forced to face dismissal even if he were an 'innocent' Communist, although such a charge could not otherwise have been the basis for his dimissal. In the question-answer situation, however, to escape this charge he could merely answer in the affirmative and subsequent dismissal proceedings would not be successful if he were in fact an 'innocent' Communist." **The Supreme Court, 1957 Term**, 72 Harvard L.R. 77, 190.

Besides, once a specific investigation has been begun, the interrogator-superior may be entitled to complete candor and forthrightness, at least where an investigation is in good faith and all questions are pertinent to competency. This too is distinguishable from a general requirement imposed on all personnel, whether suspect or not, to execute an oath of loyalty.

The circumstances which have sustained the requirement of the execution of loyalty oaths for candidates for public office, for labor union officers and for municipal employees do not exist so as to sustain the requirement in the case of school teachers. In the former cases, there exists an evil from which the oaths tend to protect the public (in theory at least—in practice, what Communist would desist from taking the oath?) In the case of teachers, however, the requirement of the oath increases an

existing evil, namely, it emphasizes the need for conformity rather than independence of thought and so tends to make a mockery of academic freedom and the principles and the guarantees of freedom of speech, thought and association as guaranteed to all persons by the First Amendment to the Constitution of the United States.

The relationship between the teacher and society and the attendant effects thereon of a required expurgatory or loyalty oath was well stated by Justice Frankfurter in his concurring opinion in **Wieman, supra**;

> "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their association by potential teachers . . .
>
> "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the

> meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State Government."

It is submitted that the requirement of a loyalty oath as a condition precedent to continuing employment for a public school teacher bears no reasonable relationship to the qualifications for that position; in fact, just the opposite is true—by the mere act of the execution of a loyalty oath an affiant pledges himself to so fetter his mind that he thereby takes a large step in destroying his own qualifications as a teacher. "The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in the library, in the laboratory, and the classroom, not on her political beliefs," Justice Black dissenting in **Lerner v. Casey** at 357 U.S. 415, 2 L. ed. 2d 1436.

It is further submitted that the required execution of a loyalty oath subverts the presumption of innocence and alters the rules of evidence. It is assumed that the affiant is guilty and he is called upon to establish his innocence, and this innocence can only be shown in one way and that is in the form of an expurgatory oath.

As Mr. Justice Douglas said in his concurring opinion in **Speiser, supra,** at 2 L.Ed.2d 1477,

"The State by the device of a loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constiutional system, for every man is presumed innocent until guilt is established."

II. THE FLORIDA STATUTE PRESCRIBES AN OATH AS A CONDITION PRECEDENT TO EMPLOYMENT AS A PUBLIC SCHOOL TEACHER WHICH IS COMPLETELY RETROSPECTIVE IN THAT IT REQUIRES THE COMPLETE ABSENCE OF CERTAIN ACTIVITIES FOR AN UNLIMITED PAST PERIOD, WHEREBY THE SAID STATUTE VIOLATES THE PROHIBITIONS AGAINST EX POST FACTO LAWS AND BILLS OF ATTAINDER.

Where statutes requiring the execution of loyalty oaths have been upheld, there has not only been a putative relationship between the oath and the class of people required to execute it, but also there has been a reasonable relationship between the objectives and prohibitions of the oath and the required qualifications for the position of public employment or public benefit.

A public employee has rights and unconstitutional conditions cannot be imposed upon continuing employment, **Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; American Communications Association v. Douds, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).** Neither a statute may prohibit, nor an oath prevent, a Negro, Jew or Catholic from public employment. An oath cannot be made a vehicle of discrimination or of punishment.

In no case since the post-Civil War period has this Court been confronted with a completely retrospective oath such as this whose provisions leave no room for mistake or penitence. After the Civil War, a number of States passed legislation requiring the execution of loyalty oaths as a pre-requisite of public employment and the practice of other professions. The general tenor of these statutes was that the affiants had never adhered to the Confederacy or had been disloyal to the United States. The test was past loyalty; present loyalty was immaterial.

In the leading cases of **Cummings v. Missouri**, (1867 U.S.) 4 Wall 277, 18 L.Ed. 356 and **Ex Parte Garland**, (1867 U.S.) 4 Wall 333, 18 L.Ed. 366 these oath requirements were stricken as Bills of Attainder and Ex Post Facto Laws prohibited by Article 1, Section 10 of the Constitution primarily because the unrelenting retrospective features were deemed punishments rather than regulations.

In **American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950) the Supreme Court of the United States in upholding the loyalty oath therein prescribed made particular note of the lack of retrospective requirement and stated:

> "This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted

a bar to signing the affidavit in the past. Past conduct, actual or threatened, by their previous adherence to affiliations and beliefs mentioned in §9(h) is not a bar to resumption of the position. In the cases relied upon by the unions, on the other hand, this Court has emphasized that since the basis of disqualification was past action or loyalty nothing that those persons prescribed by its terms could ever do would change the result. (See United States v. Lovett, Ex parte Garland, Cummings v. Missouri). Here the intention is to forestall future dangerous acts. There is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

The oath required in **Gerende** (supra) made present loyalty pre-requisite to appearing on the ballot. There was no requirement whatsoever of complete past loyalty to the United States.

In **Garner v. Board of Public Works**, 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951) the 1941 Charter of the City of Los Angeles provided that no person could hold office who, within five years prior to the act, advised or advocated the Government's overthrow by violence. However, the effectuating ordinance was not passed for seven years thereafter, in 1948. Even though limited to a five-year retrospective provision, this Court said:

> "The ordinance would be ex post facto if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their enployment must be considered as punishment, the ordinance clearly is not ex post facto. The activity covered by the oath had been proscribed by the charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath. Not the law, but the fact was posterior."

Only the Florida law now before this Court seeks to impose a completely retrospective oath upon affiant as a condition for continuing employment, thereby seeking to enforce an Ex Post Facto Law and Bill of Attainder and thus succumbing to the Constitutional prohibitions against same.

III. THE FLORIDA STATUTE PRESCRIBES AN OATH WHICH REQUIRES A COMPLETE DISAVOWAL OF CERTAIN BELIEFS AS A CONDITION PRECEDENT TO EMPLOYMENT AS A PUBLIC SCHOOL TEACHER WHEREBY THE STATUTE VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREEDOM OF SPEECH, THOUGHT AND ASSOCIATION.

The Florida Statutes require the non-existence of certain beliefs as a condition precedent to continuing employment as a public school teacher. This is clearly thought control. It is not overt action, merely, that it

prohibited; it is belief and opinion. If permitted to prohibit the employment of teachers on the basis of what they believe, cannot Florida next prohibit employment of teachers on the basis of their unsatisfactory opinions or beliefs on integration in the classroom? This is as clear a violation of the First Amendment to the Constitution of the United States as has ever been enacted.

In **American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950), and **Osman v. Douds**, 339 U.S. 846, 94 L.Ed. 1328, 70 S.Ct. 901, this Court had under consideration a similar loyalty oath wherein the Affiant was obliged to swear that "he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

This provision was sustained in each case by an equally divided court, but only because the affirmatively favoring Justices construed the statute so as to avoid the danger of unconstitutionality and held that the clause in question only applied to those who "believe in violent overthrow of the Government as it presently exists under the Constitution **as an objective**, not merely **a prophecy**." (Emphasis added)

The Supreme Court of Florida did not so construe the Florida statutes. Despite reliance of counsel in their brief for Appellant upon the foregoing decisions, as also upon **Yates v. United States**, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S.Ct. 1064 as to the distinction between "advocacy of abstract doctrine" and "advocacy directed at promoting unlawful action" in urging the Supreme Court of Florida

to define the terms used by the statute, the Supreme Court of Florida failed and refused so to do. The result of this inaction is to gloss over the distinction, thereby setting it at naught whereby the statute falls for unconstitutional proscription of rights guaranteed by the First Amendment to the Constitution of the United States.

CONCLUSION

We believe that the questions here presented are substantial and of great public importance and warrant plenary consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, TOBIAS SIMON, Attorney for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on March , 1961, I served copies of the foregoing Jurisdictional Statement on the Appellee, THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, by mailing a Copy thereof in a duly addressed envelope with postage prepaid to the office of J. R. WELLS, ESQ., c/o Maguire, Voorhis & Wells, 135 Wall Street, Orlando, Florida, and by further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

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APPENDIX A

IN THE CIRCUIT COURT OF THE 9th JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA. IN CHANCERY.

No. 38699

DAVID WALTON CRAMP, JR.,

Plaintiff,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, a body corporate,

Defendant.

MEMORANDUM OPINION

The pertinent question raised by the pleadings on bill and answer is whether the requirements of F.S. 876.05 et seq. as a condition precedent for the payment of public funds to a state employee violates the State and Federal Constitutions.

Although plaintiff by his sworn complaint, has in effect, plainly shown that he may, if he so desires, execute the required oath without fear of the penalties required by the law for a false oath, nevertheless he complains that the Act requiring the execution of a loyalty oath as a condition for public employment is a violation of due

process. The Florida Supreme Court, in State vs. Diez, 97 So.2d, 105 held:

> "In fine, we think the loyalty oath may be required without interfering with the Federal Government's operations against sedition; *we think the pertinent law does not offend against the Constitution;* we think the Act was intended to have a retrospective effect;" (emphasis supplied).

The State of Florida, acting through its duly elected representatives has the inherent right, through statutory law, to impose reasonable conditions precedent for public employment. Under the provisions of the challenged Act an employee of the State has his freedom of association as well as freedom of speech and the privilege of advocating ideas secured to him by the First Amendment to the Constitution of the United States so long as he can conscientiously execute the oath required by law. If he cannot do so he has the freedom of seeking employment elsewhere. The State has the right to preserve its integrity by requiring its employees, as one of the prerequisite conditions of employment, to subscribe to the loyalty oath. This is an inherent right secured to the body politic and under such circumstances the freedoms secured to the individual employee by the Constitution become subservient.

Plaintiff contends that the oath required by F.S. 876.05 is unconstitutional by reason of the failure to contain the elements of wilfulness and scienter. This contention was answered by the Florida Supreme Court in State vs. Diez, 97 So.2d, 105:

> "This conclusion does not lead to a decision declaring the Act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the communist party, he is representing under oath that he has not done so knowingly."

It therefore follows that F.S. 876.05 et seq. is constitutional and is mandatory as a condition precedent for public employment.

Since the defendant has denied the allegations in Paragraph 11 of the Complaint such allegations may not be considered as being proven on bill and answer. Therefore the prayer for a permanent injunction in all respects should be denied for the reason stated herein.

Dated at Orlando, Florida, March 16, 1960.

/s/ ROGER A. BARKER
Circuit Judge

APPENDIX B

FINAL DECREE

This cause having been set down by plaintiff for hearing on bill and answer, and the parties having stipulated that the parties might, on or before Monday, March 14, 1960, submit to the Court for its consideration copies of any briefs used before the Supreme Court of Florida by the parties or by the amicus curiae on this litigation as well as any other memorandum briefs or copies of decisions that the parties might wish to submit, and that the Court might thereupon dispose of the case without a formal oral argument and without other or further notice, and the Court having examined and studied the pleadings herein together with copies of briefs used before the Supreme Court of Florida and other memorandum briefs and decisions as aforesaid submitted to the Court for its consideration as aforesaid, and the Court after due consideration being fully advised in the premises and being of the opinion that plaintiff is entitled to a determination regarding the constitutionality and validity as to him of Sections 876.05 and 876.06, Florida Statutes, and the Court having concluded from its study that said Sections 876.05 and 876.06, Florida Statutes, are constitutional and valid as to plaintiff for the reasons stated in its memorandum opinion filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that said Sections 876.05 and 876.06, Florida Statutes, are hereby declared, determined and adjudged to be constitutional and valid as to plaintiff and not subject in any re-

spect to the attacks made on same by plaintiff in his complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's prayer for a permanent injunction be and the same is hereby denied in all respects.

DONE AND ORDERED at Orlando, Florida, this 16th day of March, A. D. 1960.

/s/ ROGER A. BARKER
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1960

CASE NO. 30,598

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

THORNAL, J.

Appellant Cramp who was plaintiff below seeks reversal of a final decree sustaining the validity of Sections 876.05-876.06, Florida Statutes.

We must decide whether the cited statute, which prescribes a so-called "loyalty oath" as a condition to public employment, offends various provisions of the State and Federal Constitutions.

Plaintiff Cramp had served approximately nine years in the public school system of Orange County. It was then discovered that through an oversight, he had never been required to execute the oath required by Section 876.05, Florida Statutes. The appellee Board immediately demanded that the oath be executed. The school teacher-appellant refused. He based his refusal on the contention that the statutory requirement of the execution of the oath as a condition to continuing his employment as a

public school teacher violated certain constitutional rights. Fearing dismissal he filed his complaint for a declaratory decree. He sought a temporary injunction against dismissal pending the litigation, and an ultimate decree adjudicating the invalidity of the statute. The chancellor denied the temporary restraining order. Cramp v. Board of Public Instruction, Fla., 118 So. 2d 541. On final hearing the chancellor upheld the statute against appellant's assault. The prayer for a permanent injunction was denied. By direct appeal, Article V, Section 4, (2), Florida Constitution, we are requested to reverse the final decree.

Appellant Cramp contends here, as he did in the trial court, that the subject statute is fatally vulnerable on various constitutional grounds. In sum, it is his position that the Florida loyalty oath statute is defective because it fails to specify knowledge or scienter as an element of the proscribed conduct. Appellant also contends that the statute destroys the traditional presumption of innocence and shifts the burden of proof by legislative enactment without due process; it is claimed that the statute is a bill of attainder and an ex post facto law and that it is so vague that it is unintelligible. Cramp claims that the Federal government has pre-empted the field of sedition control. Finally, he says that the Florida constitutional oath prescribed by Article XVI, Section 2, is exclusive and, therefore, does not permit any additional legislative prescription.

The appellee School Board by its brief undertakes to defend the statute against each of the attacks leveled by the appellant.

By Section 876.05, Florida Statutes, all persons em-

ployed by the State or any county or city, or school board, are required to subscribe to the following oath:

> "I, _____ a citizen of the State of Florida and of the United States of America, and being employed by or an officer of_____ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

It is required that the oath be filed with the employing governmental agency prior to the approval of any salary voucher. Section 876.06, Florida Statutes, provides for the discharge of any person who refuses to subscribe to the quoted oath.

Sections 876.05-876.06, supra, were Sections 1 and 2, Chapter 25046, Laws of Florida, 1949. We have concluded that the chancellor ruled correctly in upholding the statute against the appellant's attack.

With as much brevity as the importance of the ques-

tion permits we shall proceed to dispose of each of appellant's contentions.

It is asserted that the prescribed oath does not include an element that the maker thereof had knowledge of the subversive nature of the affiliations at the time he engaged in them. In other words, appellant contends that a man should not be held liable for a false oath if he swears to non-subversive associations when in effect, he is or has been innocently and unknowingly aligned with a subversive organization. We think this matter has been placed at rest by us as well as by the Supreme Court of the United States. In State v. Diez, Fla., 97 So. 2d 105, we held that the element of scienter was implicit in each of the requirements of the statute. Conceding the essentiality of this element, we there upheld the statute with our interpretation to the effect that implied in each requirement was the presence of scienter or knowledge. Although appellant avers that this constitutes "a judicial amendment of the statute" we find ourselves supported in such an interpretation by respectable authority. Lerner v. Casey, 357 U.S. 468; Adler v. Board of Education, 342 U.S. 485, 27 A.L.R. 2d 472; Garner v. Board of Public Works, 341 U.S. 716; Gerende v. Board of Supervisors 341 U.S. 56.

We are not disturbed by appellant's reliance on Wieman v. Updegraff, 344 U.S. 183. While this decision involved a similar loyalty oath, the highest court of the State of Oklahoma had held that the element of scienter was not essential to validity and also that it was absent from the requirements of the act. The Supreme Court of the United States merely accepted the Oklahoma court's interpretation of its State statute as to the implication

of scienter. The United States Court reversed when it held that scienter was essential. On the other hand, the implication of scienter was sustained in those decisions which we have cited to support our view.

We think the time is now passed when statutes of this type are subject to question because of alleged preemption of the field of subversive control by the Federal Government. Appellant presses his claim in this regard with continued reliance on Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497. In sustaining this same statute against the same attack in Diez v. State, supra, we indicated our view that Nelson did not preclude paralleling state action on the same problem. We specifically so held in Gibson v. Florida Legislative Investigation Committee, Fla. 1959, 108 So. 2d 729, cer. den. 360 U.S. 919. The Supreme Court of the United States similarly announced its own position on the same subject in Uphaus v. Wyman, 360 U.S. 72. Moreover, we could actually lay aside this contention on the further ground that the instant statute legitimately prescribes an element of required qualifications precedent to public employment. The statute under discussion is merely a legislative enactment asserted within the orbit of the state's police power. It simply stipulates certain conditions under which individuals can work for the State. The subversive control aspect is involved only tangentially. The primary objective of the statute is to exclude from public employment persons lacking in the stipulated qualifications or in converse, persons burdened with stipulated disqualifying qualities. Beilan v. Board of Public Education, 357 U.S. 399; Adler v. Board of Education, 342 U.S. 485, 27 A.L.R. 2d 472; Lerner v. Casey, 357 U.S. 468; Thorp v. Board of Trustees, 6 N.J. 498, 79 A. 2d 462; Nostrand v. Balmer, Wash., 335

P. 2d 10, but see Nostrand v. Little, 362 U.S. 474; Laba v. Newark Board of Education 23 N.J. 364, 129 A. 2d 273; Appeal of Albert, 372 Pa. 13, 92 A. 2d 663; Fitzgerald v. City of Philadelphia, 376 Pa. 379, 102 A. 2d 887; Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A. 2d 672; State ex rel Schweitzer v. Turner, 155 Fla. 270, 19 So. 2d 832.

Appellant contends further that the oath prescribed by Section 876.05, supra, is unconstitutional for the reason that it imposes requirements additional to those stated in the constitutional oath prescribed by Article XVI, Section 2, Florida Constitution. To this end we are requested to follow the decision of the Supreme Court of New Jersey in Imbrie v. Marsh, 3 N.J. 578, 71 A. 2d 352, 18 A.L.R. 2d 241. Were we inclined to concur in the decision of the New Jersey Supreme Court on this point and we interpolate that we are not, we are here led by the facts of the instant case to distinguish the situation before us from that presented in the New Jersey matter. It was there held that a loyalty oath in addition to the stipulated constitutional oath similar to ours, could not be imposed upon candidates for the office of governor or members of the Legislature. We do not have a state officer involved here. The Florida Constitution requires that the oath be taken by "each and every officer of this State, . . . " The appellant Cramp is a school teacher and therefore, an employee as distinguished from an officer in the constitutional sense. State ex rel Holloway v. Sheats, 78 Fla. 583, 83 So. 508; IX U. Fla. L.R. 47, (Spring 1956). The constitutional oath prescribed by Article XVI, Section 2, supra, must be taken by all state officers but is not a stipulated requirement of an employee. New Jersey itself has made the distinction. Thorp v. Board of

Trustees, 6 N.J. 498, 79 A. 2d 462. Hence, appellant is not in a class adversely affected by the statutory requirement on this point, and is therefore not in a position to gain support from this argument.

In practically all the cases decided by the Supreme Court of the United States on the subject of loyalty oaths as a condition to public employment attacks have been directed on the ground of alleged vagueness, on the contention that freedom of speech and assembly are impinged and that the presumption of innocence is destroyed. In each instance dealing with similar statutes and similar situations the United States Supreme Court has consistently upheld the statutes against such assaults. Certainly the instant statute is perfectly clear in its requirements. There could be no doubt in the minds of anyone who can read English as to the requirements of the statute and the effect of a failure to comply. Adler v. Board of Education, supra.

It has long been recognized that the First Amendment freedoms are not absolutes in and of themselves. When they are asserted as a barrier to government action we are confronted by the necessity of balancing the asserted private right against the alleged public interest. The private right will certainly not be lightly regarded. However, an indirect adverse effect on the asserted right of the individual will not preclude the exercise of governmental power when the power is shown to exist and its assertion is necessitated by the exigencies of the public wellbeing. Barenblatt v. United States, 360 U.S. 109.

As we have pointed out in other parts of this opinion, the failure to take the required oath does not

work an adjudication of guilt nor does it burden the employee with the responsibility of providing innocence against an assertion of guilt. Statutes of this type have been consistenly sustained on the theory that they constitute merely a stipulation of qualifications or disqualifications for public employment. The statute contains no prohibition against the right of a citizen to speak out or to assemble peaceably. It merely provides that when one speaks out to advocate the violent overthrow of the government of the United States, or assembles for that purpose, he cannot simultaneously work for and draw compensation from the government he seeks to overthrow.

Finally we proceed to what is probably the most difficult aspect of the instant statute. So far as we have been able to ascertain, Florida is the only state which requires the employee to swear " . . . that I have not lend [lent] my aid, support, advice, counsel or influence to the Communist Party; . . ." Others might have similar provisions but we have been referred to none. This particular provision was upheld in Diez v. State, supra. In that opinion also, we construed the word "lend" as meaning "lent" when applied to the oath regarding past conduct. We are again fronted by the contention that the Florida Statute constitutes a bill of attainder prohibited to the states by Article 1, Section 10, Constitution of the United States. This is so, asserts the appellant, because when the employee is required by law to take an oath that he has not at any time in the past aided or supported the Communist Party, or else suffer the pain of dismissal, the Legislature is adjudicating his guilt without benefit of trial and an opportunity to defend. Appellant refers to the recognized definition of a bill of attainder as a

legislative enactment which adjudicates guilt without benefit of judicial trial. He points further to the prohibition against ex post facto laws which precludes giving retroactive effect to past conduct in order to support present punishment. Article I, Section 10, supra. For reasons we hereafter mention, the Supreme Court of the United States has upheld similar statutes against similar assaults. We must confess recognition of the necessity to subordinate our own conclusions to those of the higher authority on the subjject. However, we find it in most instances a little difficult to reconcile the recent decisions of the United States Court with its earlier precedents in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356 and ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. Moreover, the opinion of this Court in McNealy v. Gregory, 13 Fla. 417, clearly committed Florida to the ruling of the Cummings decision.

In recent years, however, the Supreme Court of the United States has, with almost invariable consistency, construed Cummings and Garland as involving a situation in which there was no reasonable relationship between the past conduct proscribed and the then current business or profession from which it was sought to exclude an individual solely account of his past conduct. In other words, the United States Court has merely held that there was no reasonable relationship between the profession of the Catholic Priest in Cummings, or that of the lawyer in Garland and the proscribed past conduct of having had affiliations with the then defeated Confederacy. This Court has likewise so construed Cummings and Garland. Page v. Watson, 140 Fla. 536, 192 So. 205; Diez v. State, supra. As stated above, this position is supported by numerous recent decisions of the Supreme Court of the

United States. Hawker v. New York, 170 U.S. 189; Garner v. Board of Public Works, 341 U.S. 716; Adler v. Board of Education, 342 U.S. 485; Beilan v. Board of Public Education, 357 U.S. 399.